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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1934.

No. 11.

GEORGE W. McCANDLESS, as Receiver of DUQUESNE GAS CORPORATION,

Petitioner,

AGAINST

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION.

Brief on Behalf of the Defendants Below, Respondents in This Court.

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MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION.

Brief on Behalf of the Defendants Below, Respondents in This Court.

The order allowing certiorari limits it "to the questions pertaining to the validity of the appointment of the Petitioner as Ancillary Receiver, and his right as such to maintain this suit" (R., 74). We will therefore confine our discussion to the scope of that order.

Statement.

George W. McCandless was appointed Receiver of Duquesne Gas Corporation by the United States Dis-

trict Court for the Western District of Pennsylvania upon two bills: One filed by the Trustee under a mortgage trust indenture securing an issue of bonds and the other filed by a stockholder of Duquesne Gas Corporation.

The Duquesne Gas Corporation was duly served, the suits were consolidated and the corporation filed its answers and consented to the appointment of a Receiver by that Court.

The proceedings in the United States District Court for the Southern District of New York on the basis of which the Petitioner was appointed Ancillary Receiver of the Duquesne Gas Corporation in and for the Southern District of New York consisted of a petition by George W. McCandless, as Receiver, reciting certain of the proceedings had in the United States District Court of the Western District of Pennsylvania, attaching copies of the pleadings filed in that Court and copies of the orders made in that Court, and asking for the appointment here of an Ancillary Receiver of the corporation in and for the Southern District of New York (R., 17-52).

No independent bill of complaint was filed in the United States District Court for the Southern District of New York. No process of any kind was prayed for or issued. The corporation did not answer or appear. The proceedings were wholly *ex parte*.

Upon this application George W. McCandless was appointed Ancillary Receiver, filed the bond provided for in the order appointing him and proceeded to bring this suit.

POINT I.

The order of the United States District Court for the Southern District of New York purporting to appoint George W. McCandless Ancillary Receiver was absolutely void.

THERE WAS NOTHING BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK UPON WHICH ITS JUDICIAL POWER COULD ACT.

The question here presented concerns the power of the United States District Court for the Southern District of New York to act under the above state of facts.

It becomes necessary therefore to consider the nature and extent of the judicial power vested in United States Courts, and particularly in the District Courts of the United States, and their relations to one another. The District Courts of the United States acquire their judicial power from the Constitution of the United States and from the acts of Congress enacted pursuant thereto.

The Applicable Provisions of the Constitution.

Article III, Section 1 of the Constitution, provides in part:

> "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."

Article III, Section 2 of the Constitution provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases

of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."

The Applicable Provisions of the Acts of Congress.

Congress has established various inferior federal courts, among them being the District Courts. Section 24 of the Judicial Code (28 U. S. C. A., Sec. 41) provides, among other things with which we are not here concerned:

> "The District Courts shall have original jurisdiction as follows:
>
> (1) * * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and * * * (b) is between citizens of different States."

Congress has granted to the United States District Court for the Western District of Pennsylvania, original jurisdiction to exercise such judicial power in the following territory:

> "The western district (of Pennsylvania) shall include the territory embraced on the 1st day of July, 1910, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forst, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland." (Sec. 103, Judicial Code; 28 U. S. C. A., Sec. 184.)

It has granted to the United States District Court for the Southern District of New York original jurisdiction to exercise such judicial power in certain other territories, namely:

> "The southern district (of New York) shall include the territory embraced on the 1st day of July, 1910, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof." (Sec. 97, Judicial Code; 28 U. S. C. A., Sec. 178.)

It now becomes important to determine just what is meant by the terms "judicial power", "cases", "controversies" and "suits".

This Court has defined these terms in many cases, among others:

Marbury v. *Madison,* 1 Cranch 137;
Cohens v. *Virginia,* 6 Wheat. 264;
Osborn v. *Bank of United States,* 9 Wheat. 738, 819;
Muskrat v. *United States,* 219 U. S. 346;
New Jersey v. *Sargent,* 269 U. S. 328;
Liberty Warehouse Co. v. *Grannis,* 273 U. S. 70;
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Old Colony Tr. Co. v. *Commissioner,* 279 U. S. 716;
Nashville, C. & St. L. Ry. Co. v. *Wallace,* 288 U. S. 249.

See also:

Re Pacific Ry. Com'n, 32 Fed. 241, 255.

In the case of *Muskrat* v. *United States, supra,* at page 356, this Court uses the following language:

> "It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power,' says Mr. Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller, Const. 314.
>
> "As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to 'Cases' and 'Controversies'. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.
>
> "What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'. A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison,* 1 Cranch, 137, 2 L. ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *Re Pacific R. Commission,* 32 Fed. 241, 255. Of these terms that learned justice said:
>
> " 'The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia,* 2 Dall. 431, 432, 1 L. ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for de-

> termination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.' "

Later, in the same opinion, at page 358 this Court quotes the following from the opinion of Chief Justice Marshall in *Osborn* v. *Bank of United States,* 9 Wheat. 738, at page 819:

> "This clause (Article III of the Constitution) enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form, that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Bearing in mind the foregoing definition of judicial power and the limitations placed upon the exercise of such power by federal courts, we insist that there was not before the United States District Court for the Southern District of New York in the proceeding relating to the appointment of Petitioner as Ancillary Receiver a single one of those jurisdictional requirements which are prerequisite to the exercise of judicial power.

1. There was no complainant before that Court asserting his right against anyone.

2. There being no parties before that Court, there obviously could be no diversity of citizenship such as is required to confer jurisdiction upon that Court.

3. There was no suit instituted or pending in that Court.

1. There Was no Complainant Before That Court Asserting His Right Against Anyone.

The only person who was involved in that proceeding was George W. McCandless, a mere federal Chancery Receiver appointed by the United States District Court for the Western District of Pennsylvania who had no right, title or interest in or to the assets of the Duquesne Gas Corporation except such as arose out of the order of his appointment.

That a mere federal Chancery Receiver has no extra-territorial power of official action—none that exists by virtue of his appointment—none that the Court appointing him has power to confer upon him—is now the well recognized law of the land.

Booth v. *Clark,* 17 How. 322;
Hale v. *Allinson,* 188 U. S. 56;
Great Western Min. & Mfg. Co. v. *Harris,* 198 U. S. 561;
Sterrett v. *Second Nat. Bank,* 248 U. S. 73;
Moore v. *Mitchell,* 281 U. S. 18.

Of course, it is not true that all Receivers appointed by courts of equity have no extra-territorial power of official action.

In many states, such as Delaware, New Jersey, Minnesota, etc., statutes have been enacted providing that a Receiver of a corporation organized under the laws

of such state, when appointed by the courts of that state, becomes vested with title to the corporation's property as a *quasi assignee* or trustee.

Such state Receivers, acting in their capacity of *quasi assignees* or trustees or successors to the rights of the corporation, have been held to have power to sue in the courts of other States as well as in the federal courts for the purpose of asserting their rights as such assignees, trustees and successors to the rights of the corporation; but this Court has made it abundantly clear that in sustaining the rights of such a Receiver to assert such rights, the person acting as Receiver was not suing as a mere equity Receiver but rather in the capacity of *quasi assignee,* trustee or successor to the rights of the corporation. The designation of himself as Receiver in the title of the cause has been held to be *descriptio personnae* merely.

> *Bernheimer* v. *Converse,* 206 U. S. 516;
> *Converse* v. *Hamilton,* 224 U. S. 243;
> *Oakes* v. *Lake,* 290 U. S. 59.

Congress, however, has never enacted any laws so extending the powers or rights of mere federal equity Receivers as to authorize them to act beyond the jurisdiction of their appointment except to a very limited extent, although the question of extending such powers or rights has been presented to Congress by several bills.

In the Second Session of the 71st Congress several bills were introduced—(H. R. 9997, 9998, 9999 and 10000)—the purpose of which was to grant certain extra-territorial powers to federal equity Receivers in all of the judicial circuits of the United States. These bills failed to pass.

In Section 56 of the Judicial Code (36 Stat. 1102, 28 U. S. C. A. 117), Congress has provided a method by

which the powers of federal Receivers might be extended where land, or other property of a fixed character, the subject of the suit, lies within different States but in the same judicial circuit in which the Receiver is appointed. However, even in this Act, Congress has very carefully pointed out the exact procedure to be followed before a Receiver may obtain this very limited extension of power and this Court in *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, held that Section 56 of the Judicial Code did not apply to the assets of an insurance company but related only "to those cases where the fixed property is a unit, extending into several States, like interstate railroads and pipe lines." *Lion Bonding & Surety Co.* v. *Karatz, supra,* at page 87.

In Section 2 of the Bankruptcy Act of 1898 (11 U. S. C. A. 11) the District Courts of the United States are made courts of bankruptcy and subsection 20 thereof confers on them the power to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a Receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

It will be noted also that under the federal law judgments and decrees rendered in a District Court of the United States within any State are liens only on property throughout such State to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State (25 Stat. 357; 37 Stat. 311; 28 U. S. C. A. 812) and all writs of execution upon judgments or decrees obtained in a district court, other than judgments obtained for the use of the United States may run and be executed only in the State in which the district lies (R. S. Secs. 985, 986; 28 U. S. C. A., Secs. 838, 839).

So far as we know these are the only Acts of Congress upon this subject.

We respectfully insist that, under all of the decisions of this Court, when Mr. McCandless came into the Southern District of New York, he had no power of official action respecting the property or claims of Duquesne Gas Corporation in this jurisdiction. Therefore he could not become an actor in any suit or proceeding in this State. He was not a party aggrieved. 3, Street, "Federal Equity Practice", Section 2695. *The Wabash,* 296 Fed. 559, 562.

The rule so often reiterated by this Court in *Booth* v. *Clark, Hale* v. *Allinson, Great Western Min. & Mfg. Co.* v. *Harris, Sterrett* v. *Second Nat. Bank and Moore* v. *Mitchell, supra,* that it has now become the well settled law of the land that mere federal equity Receivers have no official power beyond the jurisdiction of the Courts appointing them is based upon the recognition of the fact that each district court of the United States is a creature of Congress, that it has jurisdiction only to the extent to, and in the territory in, which jurisdiction has been conferred upon it by Congress and that only Congress has the power to extend that jurisdiction beyond such territory.

2. There Being no Parties Before That Court, There Obviously Could Be no Diversity of Citizenship Such as Is Required to Confer Jurisdiction Upon That Court.

No extended discussion of this is necessary.

3. There Was no Suit Instituted or Pending in That Court.

There was no bill of complaint filed in the United State District Court for the Southern District of New York. No process of any kind was prayed for or issued.

The corporation did not appear. It is so obvious that there was no suit before that Court upon which it could exercise original jurisdiction that we consider extended discussion unnecessary.

Unless therefore the United States District Court for the Southern District of New York had somewhere acquired the power to exercise summary ancillary jurisdiction auxiliary to that of the United States District Court for the Western District of Pennsylvania, it obviously had no jurisdiction to make the order appointing an Ancillary Receiver in this proceeding (R., 50), and such order is, therefore, absolutely null and void.

General Discussion.

We are not compelled to rely upon the general principles hereinbefore discussed to establish our contentions. The identical question here presented has been passed upon by many courts of the highest standing.

In the case of *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, 39 Fed. 337, a proceeding very similar to the one in the case at bar was instituted, the main difference being that in that case the proceedings were instituted by a party who could have filed an original bill.

Judge Harlan, speaking for the Court, after holding that the bill should be dismissed, categorically said that if the active intervention of the Federal Court in West Virginia was desired in respect to the mortgaged property located in West Virginia, it must be invoked by a separate independent bill.

The Court thereafter uses the following language:

> "It might be well if Congress would so enlarge or regulate the jurisdiction of the courts of the United States as to enable a circuit court in which is brought an original suit for the fore-

> closure of a mortgage resting upon an interstate railroad to take actual possession, by its officers, of the entire line, and of all the mortgaged property, wherever situated, and administer it for the benefit of all concerned; preserving in that mode the unity of the railroad, and the just rights of mortgagors, mortgagees, creditors, as well as those of the general public interested in commerce among the States. But there has been no such legislation, and we do not see our way clear to effect any such result by judicial orders merely" (p. 340).

A case on this subject much cited is that of *In re Brant,* 96 Fed. 257. In that case the Court said:

> "In this matter the petition is entitled '*Marcus M. Towle, Complainant* v. *American Building, Loan & Investment Society, Defendant,*' indicating the pendency here of a suit in equity. No such suit, however, has been brought in this court, and said title is erroneously employed. There is no defendant to the proceeding, but it is purely *ex parte,* and for this reason, namely, because no suit in equity is pending here, I hold that this court is without jurisdiction to appoint a receiver of any sort, either ancillary or original" (p. 257).

In the case of *Sullivan* v. *Swain,* 96 Fed. 259, the same Court held:

> "The original complainant, William K. Sullivan, who, on his *ex parte* petition, was appointed an ancillary receiver by this court prior to the institution of said suit, having since died, and the petition of one Henry Brant to be appointed successor to said Sullivan having been denied by an order this day entered *in Re Brant* (No. 722) 96 Fed. 257, for lack of jurisdiction, and the appointment of said Sullivan having, for the same reason, in the same order, been vacated, it follows that, in determining the question of

> jurisdiction in the pending suit, the suit must be considered as an independent suit for foreclosure, brought by a foregin receiver, and without any reference whatever to said appointment. Under these circumstances it seems to me that there is no escape from defendants' contention that, inasmuch as the matter in dispute is less than $2,000 this court is without jurisdiction. If it be conceded that the suit is one arising under the constitution and laws of the United States because brought by the receiver of a federal court, still the other requisite to federal jurisdiction, namely, that the amount involved must exceed $2,000, is lacking. It is true that where a receiver, in administering his trust, brings an action in the court which appointed him, such court has jurisdiction of the action without regard to the amount involved or the citizenship of the parties (*White* v. *Ewing,* 159 U. S. 36, 15 Sup. Ct. 1018; *Lanning* v. *Osborne,* 76 Fed. 319); but in such a case the jurisdiction is upheld on the ground that the action is but auxiliary to—indeed a part of—the original suit, in which the receiver was appointed. This ground of jurisdiction, however, manifestly does not exist where the receiver sues in a jurisdiction other than that of his appointment. The suit will be dismissed for lack of jurisdiction'' (p. 259).

In *Fairview Fluor Spar & Lead Co.* v. *Ulrich,* 192 Fed. 894, it appears that a citizen of Pennsylvania filed a verified *ex parte* bill in the Eastern District of Illinois, reciting among other things that he had previously filed a bill and amendment thereto in the Circuit Court for the District of Delaware against the ''Development Company'' and had secured the appointment and qualification of Ulrich and Joslyn as Receivers of the property of the Development Company and attaching the Delaware bill, its amendment, the decree appointing the Receivers and the Receivers'

bonds as exhibits thereto. Said bill contained other recitals showing the existence of property of the "Development Company" in Illinois, and requesting the Circuit Court for the Eastern District of Illinois to appoint Ulrich and Joslyn as Receivers of the Company in Illinois.

Thereafter, upon the verified bill and the several exhibits attached thereto, the lower court appointed Ulrich and Joslyn as Receivers of the assets of the defendant company with the usual powers of such Receivers. Such Ancillary Receivers qualified and brought suit in the Circuit Court of the United States for the Eastern District of Illinois to recover assets of the Development Company.

The Court in passing upon the power of the lower court to appoint Ancillary Receivers upon a mere *ex parte* bill, used the following language:

> "Here the original plaintiff was not made a party, nor was there any defendant named. Nor was any process prayed for. The proceeding lacked the essential features of a pending suit. There was nothing upon which the jurisdiction of the court could attach—nothing which could affect the rights or status of the defendants in the said amended bill. To them it was a nullity —something of which they were not bound to take notice. It in no way enlarged the powers of the foreign receivers as to the defendants to the amended bill. This being so, we are presented with the bald question whether foreign receivers having only the title acquired by the order of the court appointing them could maintain their suits in the Circuit Court of the United States for the Eastern District of Illinois, for there is nothing in the record to show that the receivers had any other title to the property of the Development Company than that derived from the order of the Delaware Court.
> • • •

> "We are of the opinion that the facts disclosed in the record bring this cause within the disapproval of the authorities; that the original *ex parte* proceeding in the Circuit Court of the United States for the Eastern District of Illinois was ineffectual to invest the foreign receivers with powers to act as receivers in said district; that the court was therefore without jurisdiction to entertain the subsequent proceedings in, or based upon, said cause; and that such want of jurisdiction is now presented in this record." (p. 897.)

In *Greene* v. *Star Cash & Package Car Co.*, 99 Fed. 656, an Ancillary Receiver of a corporation was appointed upon the *ex parte* application of a primary Receiver. A motion was made to vacate the order of appointment. The Court after referring to *Platt* v. *Philadelphia & R. R. Co.*, 54 Fed. 569 and *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, *supra*, vacated the appointment and said:

> "Here not only is no suit pending in this jurisdiction, but the application for appointment of the ancillary receiver is not made by Lakin, the only party seeking relief in the Circuit Court in West Virginia. This bill is filed by the receiver appointed in that suit, who is merely an officer of the West Virginia Court, who is not aggrieved, and who is not seeking any relief." (p. 656.)

It is true that the Court in its opinion gave as an additional reason the charge that the corporation had been deceived as to the pendency of the primary suit for the appointment of the primary Receiver.

It is significant, however, that the order was vacated. Certainly, if the Ancillary Receiver had been appointed in a pending suit, after due notice to the corporation and upon a proper showing of the facts, the fact that

certain improprieties had occurred in another jurisdiction could not have been the basis of vacating the order of appointment.

See also:

Pressley v. *Harrison,* 102 Ind. 19;
Baker v. *Backus' Adm'r,* 32 Ill. 96;
Bank v. *Circuit Judge,* 43 Mich. 296;
Jones v. *Schall,* 45 Mich. 380;
2 Beach, Mod. Eq. Prac., Section 721;
2 Daniell, Ch. Pl. & Prac. (6th Ed.) page 1734;
3 Street "Federal Equity Practice", Sections 2542, 2694-2695;
C. W. Wickersham, "Primary and Ancillary Receiverships", 14 Virginia Law Review, 599, 601.

Concerning the Petitioner's Argument.

In his brief, the Petitioner says: (p. 6) "The opinion of the Court below contains the following statement of its reason for declaring petitioner's appointment as Ancillary Receiver void;

> 'Thus, upon the petition alone of a foreign federal receiver, an ancillary receiver is appointed, where no bill had been filed in the jurisdiction by any party aggrieved praying for such relief. No process was issued in this jurisdiction and there has been no appearance or answer filed by the corporation within the district (R. 72). * * *
>
> 'Ancillary proceedings are independent suits and there must be a plaintiff and a defendant and the first must be one who claims injury committed by the defendant. * * * The appointment of the plaintiff as ancillary receiver was void, and he did not acquire, in any of the proceedings, a status to warrant the institution of this suit.' " (R. 73.)

Thus the Court below summarized the position of the Respondents herein.

Petitioner, however, asserts: (Page 7 of Petitioner's brief)

> "A conclusion opposite to that reached by the Court below has been arrived at by the Circuit Court of Appeals in the other Circuits in which the question has come up for decision, viz. the Third, Fourth, Eighth and Ninth Circuits. See *Mitchell* v. *Maurer,* 69 Fed. (2nd) 233 (C. C. A. 9th, 1934); *Ward* v. *Foulkrod,* 264 Fed. 627 (C.C.A. 3rd, 1920); *Coal & Iron Ry. Co.* v. *Reherd,* 204 Fed. 859, 882 (C.C.A. 4th, 1913); *Rust* v. *United Water Works Co.,* 70 Fed. 129 (C.C.A. 8th, 1895)."

It will be noticed that the Petitioner has made the most intensive research into the decisions concerned with the rule announced in the case of *Booth* v. *Clark,* and others, (see Petitioner's brief, pp. 22-23). We must assume that the cases here presented represent the most favorable in support of Petitioner's views that can be found.

But an examination of the cases cited by the Petitioner discloses the fact that none of them are authority upon the question here discussed.

Let us analyze them:

In the case of *Rust* v. *United Water Works Co.,* 70 Fed. 129, of the cases cited by Petitioner, the first in point of time, decided by the Circuit Court of Appeals of the Eighth Circuit, an action had been brought in the Circuit Court of the United States for the District of Colorado by the United Water Works Co. against the American Water Works Company, a New Jersey corporation, to recover a judgment for the sum of $118,512.50.

Prior to the commencement of this action, a Receiver was appointed of the American Water Works Com-

pany in a suit brought in the Court of Chancery of the State of New Jersey. After the entry of the judgment in the Colorado suit, the New Jersey Receiver filed a petition in the Colorado suit to vacate the judgment and for leave to interpose pleas to the jurisdiction of the Court, and defenses to the recovery the judgment evidenced.

Under the laws of the State of New Jersey Receivers of New Jersey corporations appointed by the Chancery Courts of that State become "the trustee for its creditors and stockholders, the successor to its rights and interests under the provisions of its charter." (p. 137).

To dispose of the effect of this authority upon the questions here discussed, it is only necessary to quote the last paragraph of the decision of the Court at page 137:

> "The result is that the receiver of the property of the American Waterworks Company, the trustee for its creditors and stockholders, the successor to its rights and interests under the provisions of its charter, proved to the court below that a judgment had been rendered against that corporation for $118,512.50, without a legal service of any summons or notice upon it, in a court in which the defendant in error was forbidden by an act of congress to sue it, and prayed that the execution upon the judgment might be stayed, that the judgment might be set aside, and that he might be admitted to specially or otherwise plead and prove these facts, and such other defenses as the corporation had to this action. These facts furnish ample grounds, in our opinion, to entitle the plaintiff in error to the relief sought by his petition."

This Receiver was not a mere chancery Receiver. He was a quasi assignee, a party aggrieved.

Of course, this Receiver had the right to sue anywhere. Bernheimer v. *Converse,* 206 U.S. 516.

In *Ward* v. *Foulkrod,* 264 Fed. 627, decided by the Circuit Court of Appeals of the Third Circuit in 1920, a stockholders' action was brought against a Delaware corporation in the Delaware State Court in which the appointment of receivers was prayed for. Thereafter and while the Delaware State Court action was pending, a creditors' bill was filed against the Delaware corporation in the United States District Court for the Eastern District of Pennsylvania and Foulkrod was appointed Receiver and thereupon took possession of all of the property of the corporation within the jurisdiction of the Court appointing him. The property of the corporation in Pennsylvania consisted in large part of real estate located in that State. Thereafter Receivers were appointed in the Delaware State Court action and, after qualifying, they filed a petition in the District Court of the United States for the Eastern District of Pennsylvania, reciting the proceedings pending in the two courts and praying that the District Court annul its order appointing a Receiver and directing its Receiver to turn over to the Delaware Receivers all the property of the corporation in his hands. This petition was denied on the ground that the exception to the rule relating to the right of Receivers as quasi assignees of the property of a corporation to bring suit anywhere does not extend to a Receiver who, as under the Delaware law, Section 3884 of the Revised Code, is vested with the corporation's title to personal property (everywhere) but not with its title to real property (beyond the jurisdiction of the State). This exception did not extend to such a Receiver the right to have the corporation's property *of both kinds* unconditionally surrendered to him by a court foreign to

that of his appointment, as broadly demanded by the petition of the State Receivers in the *Ward* case. (The words in parentheses are supplied by us.)

We call attention to the fact that this Receiver was a successor to the rights and property of the corporation wherever situated, except real estate situated in a foreign State. Of course, this Receiver was not a mere chancery Receiver. Except as to real estate located outside of the State of Delaware, he acquired title to all of the property of the corporation.

In *Mitchell* v. *Maurer,* 69 F. (2nd) 233, decided by the Circuit Court of Appeals for the Ninth District, the Chancellor of the State of Delaware had appointed three Receivers of a Delaware Corporation in a suit pending before him. These three Receivers filed a bill of complaint in the United States District Court for the Southern District of California for the ascertainment of the indebtedness of the corporation to the creditors in California, for the administration of its assets there and for the transmission of the net balance of its assets and property to the Delaware Chancery Court. Ancillary Receivers were thereafter appointed, the validity of whose appointment was sustained.

However, under Section 3884 of the Revised Code of Delaware, a Receiver of a Delaware corporation appointed by a Delaware Court of Chancery is vested, as a quasi assignee, with title to the corporation's property of every kind except real estate situated outside the State.

These Receivers were not mere chancery Receivers. They were quasi assignees. They were parties aggrieved. There can be no question but that this Receiver had the right to appear in the State of California as an actor and was entitled to be recognized by that Court.

In the case of *Coal & Iron Ry. Co.* v. *Reherd,* 204 Fed. 859, it appears that five partners filed a bill of complaint in the Circuit Court of Virginia against the sixth partner for the dissolution of a partnership and secured the appointment of one of their number, P. W. Reherd, as Receiver of the partnership.

This Receiver brought suit against the defendant, Coal & Iron Railway Company, in the Federal Court in the State of West Virginia on the 21st day of March, 1904. Thereafter, on the 15th day of January, 1906, *the same complainants* in the Virginia State Court action filed an ancillary bill in the Circuit Court of Randall County, West Virginia, *against the same defendant* in the Virginia action. Peter W. Reherd, the primary Receiver, was appointed Ancillary Receiver by the West Virginia state court with authority to intervene and prosecute the course of action asserted in the pending suit, as party plaintiff. The intervention took place and the plaintiff recovered judgment.

The question decided in that case was whether the procedure adopted by the Ancillary Receiver in intervening in the pending suit, instead of instituting a new suit, was a fatal defect. The Court held that although the proceeding was irregular, yet when the plaintiff came into the United States Court in West Virginia under the order of the West Virginia Court, he constituted himself a party to the pending suit, and the pleadings and subsequent proceedings having been made to conform, that that in effect was the commencement of the suit *de novo.*

Plaintiff also in his brief refers to three other cases:

Shinney v. *North American Savings, Loan & Building Co.,* 97 Fed. 9;
Seested v. *Bonfils,* 33 Fed. (2nd) 185;
Bluefields S.S. Co. v. *Steele,* 184 Fed. 584.

In the *Shinney* case, *supra,* one Graves was appointed Receiver of a Minnesota corporation by a State Court of Minnesota. Thereafter, in a suit pending against the corporation in the Circuit Court for the District of Utah, in which suit a bill of complaint was filed, the defendant corporation was regularly served with process, appeared and answered the complaint and the Minnesota Receiver filed a petition asking that he be appointed Receiver of the assets of the defendant corporation within Utah and that such receivership be ancillary to the primary administration of the State Court of Minnesota. He was thereafter appointed Ancillary Receiver.

Shinney, a creditor of the Minnesota corporation, brought an action against that corporation, its Receiver, and the Norwich Union Fire Insurance Co. in the State Court of Utah. The Receiver removed the suit to the District Court and the plaintiff thereupon moved to remand on the ground, among others, that the suit wherein Graves was appointed Receiver in Utah did not give the Court jurisdiction to appoint a Receiver. No attack was made in that suit on the propriety of the filing of the petition by the Minnesota Receiver. The sole question was whether the Circuit Court in Utah had jurisdiction to appoint a Receiver in the suit then pending before it. Upon that point the Court held:

> "The propriety of the original appointment of a receiver, or of the appointment of defendant Graves as ancillary receiver, is not material here, if jurisdiction to make the appointment existed. That a general power exists to appoint a receiver of the assets of a foreign corporation within the jurisdiction of the court appointing is well settled. *Williams* v. *Hintermeister,* 26 Fed. 889; *Murray* v. *Vanderbilt,* 39

> Barb. 140; *Trust Co.* v. *Miller,* 33 N.J. Eq. 155; 5 Thomp. Corp. Sec. 6860, 6861. And the case of *Buswell* v. *Order of Iron Hall,* 161 Mass. 224, 36 N.E. 1065, is a precedent for the appointment here made. Jurisdiction of the person is unquestioned. The corporation was regularly served with process, appeared, and answered the complaint, and has never objected to the jurisdiction. The appointment of a receiver was a part of the relief expressly sought in the suit, and there was an attempt to state a cause of action therefor. If, for the purposes of the argument, it were admitted that the complaint did not state a good cause of action, or affirmatively showed that the plaintiff was not entitled to the relief prayed, the jurisdiction would still exist. An appointment on such a bill would be erroneous, but in no sense void. The action of the court being property invoked, its determination would not be void for want of jurisdiction, so long as it was within the issues tendered. *Reynolds* v. *Stockton,* 140 U.S. 254-269, 11 Sup. Ct. 773; *Moore* v. *Martin,* 38 Cal. 428; *Ricketts* v. *Spraker,* 77 Ind. 371; *In re Latta,* 43 Kan. 533, 23 Pac. 655; *Young* v. *Lorain,* 11 Ill. 624; Van Fleet, Coll. Attack, Sec. 61." (p. 10.)

Certainly a chancery Receiver can be appointed only in a pending suit. In the *Shinney* case there was a bill of complaint filed, the corporation was duly served with process and it appeared and answered the bill of complaint. That is the only method by which a federal chancery Receiver, original or ancillary, may be appointed.

In *Seested* v. *Bonfils, supra,* one of two judgment creditors of a Missouri corporation had previously caused a Receiver of that corporation to be appointed in a state court of Missouri, on the ground of insolvency.

These judgment creditors filed a bill in the District Court of the District of Colorado in which they prayed for the appointment of an Ancillary Receiver to recover the property of the Missouri corporation which had been unlawfully removed out of Missouri to Colorado in fraud of creditors, pay off local creditors and pay the remainder over to the Missouri Receiver to the end that their judgments might be satisfied.

The defendant moved to dismiss the bill on the ground, among others, that the Missouri court lacked jurisdiction to appoint the primary Receiver.

As to this, the Court said (p. 186):

> "The statement discloses that the judgment, appointment of the receiver, the orders issued, and other proceedings in the Missouri court, are based upon personal service, and, being properly authenticated, are conclusive upon us, and cannot be here attacked collaterally."

This seems to have been an ordinary suit for the appointment of an Ancillary Receiver by proper parties. Its bearing on the case at bar is difficult to discern.

There can be no question but that this Court had jurisdiction.

In *Bluefields S.S. Co.* v. *Steele, supra,* the complainant, Fred M. Steele, a citizen of the State of Illinois, filed a bill in the Circuit Court of the United States for the Eastern District of Pennsylvania against the defendant Bluefields Steamship Company, a corporation of the State of Louisiana. The bill contained allegations to show that the same complainant had filed a bill in the United States Circuit Court for the Eastern District of Louisiana against the same corporation on account of the various matters and things set up in said bill, and that one Elmer E. Wood had been appointed Receiver for the defendant by

that Court. The bill asked that a Receiver ancillary to the receivership in Louisiana be appointed.

The defendant appeared specially and objected to the proceedings on the ground that the suit was not brought in the district of the residence of either the plaintiff or the defendant. The defendant, however, also moved to dismiss the bill upon the merits.

The decision of the Circuit Court of Appeals in this case was to the effect that by appearing and moving to dismiss on the merits, the defendant had waived any question of lack of venue, citing a decision of this Court to that effect. The Court, however, held that the bill was defective in not setting forth facts sufficient to justify the appointment of an Ancillary Receiver and reversed the case upon that ground.

In the *Bluefields* case, *supra,* certain *obiter dicta* can be found to the effect that certain of the jurisdictional requisites of a suit are not essential in a proceeding to secure the appointment of an Ancillary Receiver. From the foregoing statement, it is very clear that this question was not before the Court for decision. We cannot believe that the Court in making that statement took into consideration the constitutional limits on the exercise of judicial power. Had these questions been before that Court, we are confident that it would not have used the language employed in this *obiter dicta.*

The complainant also refers to *Walker* v. *United States Light & Heating Co.,* 220 Fed. 393, but that decision merely holds that the defendant corporation, having once consented to the appointment of a Receiver upon the application of a simple contract creditor, was estopped in another suit from objecting to the appointment of an Ancillary Receiver by another simple contract creditor. It will be noted, however,

that in this case it is stated in effect that an independent bill is necessary to confer jurisdiction upon a federal court to appoint such Ancillary Receiver.

It is quite true that in the opinions of the various courts above referred to there can be found much *obiter dicta* relating to the rights of foreign Receivers to sue. This *dicta* should, however, be construed in connection with the issues before the Court in each case. For instance, in those cases in which state chancery courts had appointed Receivers over corporations organized under the laws of such states and such Receivers, who, under the laws of such states, succeed to the title of the corporation in its property, were asserting rights, the statement of the court to the effect that foreign Receivers are entitled to bring certain actions and to commence certain proceedings must be construed to mean that such Receivers as have acquired title in the manner pointed out, have the right to institute such actions and take such proceedings.

However, there is no case cited by the Petitioner, nor is there any decision that we have found, which holds that an Ancillary Receiver can be appointed by a federal court upon the *ex parte* application of a mere foreign federal chancery Receiver, unless the case of *Platt* v. *Philadelphia & R.R. Co.,* 54 Fed. 569 so holds.

From the meager report of that case it appears that there was a bill filed, that there were appearances and argument before the Court. To that extent it was a suit. It does not appear whether the complainant was the primary Receiver. It merely holds that such appointments had been made *ex parte.* Nor was the order made intended to represent the final opinion of the Court upon the subject. In a short decision in

which the order offered with the bill was ordered entered, the Court says: (p. 569):

> "We will at present follow this practice, stating, however, that this is without prejudice to a *full consideration of the question if hereafter a motion is made to dissolve or annul the order.*" (Italics ours.)

Petitioner also cites a great number of decisions of State courts concerning the right of foreign Receivers to bring suits in the courts of such States (Petitioner's Brief, pp. 22-23). An examination of these decisions shows that many of these actions were instituted by Receivers who under the laws of the State of their appointment were also quasi assignees.

Moreover, it must be borne in mind that the jurisdiction of State Courts is not subject to the limitations which the Constitution of the United States has imposed upon the jurisdiction of federal courts.

State courts, as a rule, have original jurisdiction not only in cases, controversies and suits, but in proceedings plenary and summary.

The jurisdiction in civil matters of federal courts, however, is so limited that the judicial power can be exercised only in suits.

Finally, upon this subject we call attention to the language of Mr. Justice Day in *Great Western Min. & Mfg. Co.* v. *Harris, supra* (p. 578):

> "There are numerous and conflicting decisions in the state courts as to the rights of a receiver to sue in a foreign jurisdiction upon principles of comity, which it is not necessary to review here. In this court, since the case of *Booth* v. *Clark,* 17 How. 338, 15 L. ed. 170, we deem the practice to be settled, and to limit a receiver who derives his authority from his appointment as such, to actions, either in his own name or

that of an insolvent corporation, such as may be authorized within the jurisdiction wherein he was appointed."

FROM THE FOREGOING ANALYSIS OF THE CONSTITUTIONAL LIMITATION UPON THE EXERCISE OF THE FEDERAL JUDICIAL POWER, IT SEEMS TO US TO BE SELF-EVIDENT THAT, (A) SINCE A MERE FEDERAL CHANCERY RECEIVER'S POWER TO SUE IS LIMITED TO SUITS BROUGHT WITHIN THE JURIDICTION WHEREIN HE WAS APPOINTED, AND (B) SINCE THE JUDICIAL POWER OF FEDERAL COURTS CAN BE EXERCISED ONLY IN SUITS BROUGHT IN THE FORM PRESCRIBED BY LAW:

(1) A MERE FEDERAL CHANCERY RECEIVER CANNOT INVOKE THE JUDICIAL POWER OF A FOREIGN FEDERAL COURT IN ANY MANNER WHATSOEVER, AND

(2) NO ONE CAN PROCURE THE APPOINTMENT OF AN ANCILLARY RECEIVER EXCEPT IN A PENDING SUIT BROUGHT IN THE MANNER PRESCRIBED BY LAW, AND

(3) THEREFORE, THE ORDER APPOINTING THIS PETITIONER ANCILLARY RECEIVER IS NULL AND VOID FOR WANT OF JURISDICTION.

POINT II.

The power of a United States District Court to appoint Ancillary Receivers in civil cases may be exercised only in a pending suit.

As we have already seen, the terms of the Constitution and the acts of Congress, limit the exercise of the judicial power by District Courts in civil cases to suits at law and in equity. Beyond this it does not extend and unless it is asserted in a suit at law or in equity within the meaning of the Constitution

and the acts of Congress, the power to exercise it is nowhere conferred. *Muskrat* v. *United States, supra.*

By no stretch of the imagination can the proceedings instituted in this case for the appointment of an Ancillary Receiver be considered a "suit" within the meaning of the Constitution or the acts of Congress made pursuant thereto.

The petitioner, however, contends that somehow, somewhere, the District Courts of the United States have acquired jurisdiction to appoint Receivers ancillary to Receivers in other courts without reference to this limitation upon their power.

Petitioner, in effect, contends that if any Court of the United States shall have acquired jurisdiction to appoint a Receiver and shall have appointed a Receiver in that case, all other District Courts in the United States can act summarily and appoint Ancillary Receivers upon the mere application of the primary Receiver, without notice to any one, without the filing of a bill of complaint and without the pendency of a suit.

We are at a loss to understand just where and how such jurisdiction was acquired.

That such power has never been expressly conferred by any act of Congress is certain.

That District Courts have the power in pending suits to appoint Receivers in their own jurisdiction and to require such Receivers to act in connection with and as auxiliary to so-called primary Receivers appointed in any foreign court is also certain.

The practice in federal, and state courts, of appointing Receivers in aid of receivership proceedings pending in foreign courts, federal or State, has resulted from the exercise of comity by such courts and is now very common.

However, it would seem too clear for debate that in order to exercise such power, courts must first acquire jurisdiction over something or somebody.

Congress undoubtedly has the power to ordain and establish the inferior courts of the United States. This power, however, can be exercised only within the Constitutional grant. In ordaining and establishing the district courts of the United States, except in certain instances which will be discussed hereafter, Congress has granted to them original jurisdiction in suits and nothing more.

It therefore appears that federal courts have the power (and they frequently exercise it) to appoint so-called Ancillary Receivers while acting within the scope of the jurisdiction conferred upon them.

Where the defendant is a corporation, this requires the institution of a suit by some one, a citizen of another state, who has acquired an interest in the property of the corporation such as a bondholder, a trustee for bondholders, a judgment-creditor or a stockholder in which suit the right or interest of such complainant in the property of the corporation is asserted and relief is prayed for. The District Court, having thus acquired jurisdiction, can, and usually does, make such orders as justice and the harmonious administration of the estate by different courts, requires. After enforcing local laws applicable to the administration of the assets under its control, the final disposition of what is left is usually committed to the court that first acquired jurisdiction.

There is therefore no necessity or sound reason for conferring upon the District Courts of the United States this summary power the exercise of which seems to be in direct conflict with the spirit of the Constitution of the United States. We respectfully

insist that there exists no power outside of Congress to grant it and Congress has not done so.

There is considerable confusion in certain *obiter* to be found in some of the decisions as to just what ancillary jurisdiction is.

The fact that Receivers appointed in aid of receivership proceedings pending elsewhere are generally called Ancillary Receivers has added to this confusion. The suits, in which such appointments are made, are in no sense ancillary suits.

Let us now see to what extent this Court has recognized the power of any federal court to exercise ancillary jurisdiction.

In *Babbitt* v. *Dutcher*, 216 U.S. 102, and in the cases there cited, this Court has held that Congress had granted to the federal district courts jurisdiction to entertain proceedings instituted by a trustee in bankruptcy, duly appointed in a bankruptcy proceeding in another district, to compel the officers of the bankrupt to deliver to the trustee the documents in their possession relating to the business of the bankrupt.

Subsequently, Congress added subdivision 20 to Section 2 of the Bankruptcy Act of 1898. Congress there provided that Courts of Bankruptcy would have the power to:

> "(20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

In this manner the ancillary jurisdiction of United District Courts in bankruptcy matters was created.

Again in *White* v. *Ewing*, 159 U.S. 36, 38, 15 Sup. Ct. Rep. 1018, this Court quotes the following from *Porter* v. *Sabin*, 149 U.S. 473, 479:

> "When a court exercising jurisdiction in equity appoints a receiver to hold the property of a corporation, *that court* assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the Court shall ultimately adjudge to be entitled to it." (Italics ours.)

Continuing, the Court says (p. 39):

> "The circuit court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditors' bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver; and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties or of the amount in controversy."

Later, this Court says (p. 39):

> "Indeed, it was conceded that, where an insolvent corporation is placed in the hands of a receiver of the circuit court, such appointment draws to the jurisdiction of *that court* the control of its assets, so far as persons having claims to participate in the distribution of such assets are concerned, and that parties must go into *that court* in order to assert their rights, prove their demands, and receive whatever may be due them, or their share or interest in the estate." (Italics ours.)

In considering the effect of these decisions, it must be borne in mind, first that the jurisdiction of bankruptcy courts is not limited to suits as is the jurisdiction of the District Courts in civil cases. It is true that the District Courts of the United States are named among others as Courts of Bankruptcy but the jurisdiction conferred upon them as Courts of Bankruptcy is very comprehensive, and extends to summary proceedings of many kinds (Section 2, Bankruptcy Act of 1898); and second, that the decisions of this Court recognizing the existence of ancillary jurisdiction of courts in suits at law or in equity very definitely confines its exercise to the very court in which primary jurisdiction has been acquired.

Moreover, federal courts in different states, except where Congress has ordained otherwise, are foreign courts as to one another, just as fully as they are foreign courts to State Courts, and just as fully as State Courts are foreign courts to state courts of other states.

In *Horn* v. *Pere Marquette R. Co.,* 151 Fed. 626, in an opinion written by Lurton, Circuit Judge, we find a very definite statement on this subject (p. 631):

> "Federal Courts of different States are undoubtedly foreign courts as to each other in as full sense as are State courts of different jurisdictions."

The Court, however, states that that statement does not apply to federal courts in different districts but in the same State, and adds (p. 631):

> "That the jurisdiction of a particular Circuit Court is confined in general within the territorial limits of a judicial district may be conceded. *Toland* v. *Sprague,* 12 Pet. 300, 9 L. Ed. 1093; *Barrett* v. *United States,* 169 U.S. 218, 221, 18 Sup. Ct. 327, 42 L. Ed. 723."

The entire history of federal legislation upon this subject indicates in Congress a fixed determination to keep the jurisdiction of district courts in different states separate and distinct from one another. (See pages 9-10 *supra.*)

Moreover, the decisions of this Court in *Booth* v. *Clark, Hale* v. *Allinson, Great Western Min. & Mfg. Co.* v. *Harris, Sterrett* v. *Second Nat. Bank,* and *Moore* v. *Mitchell, supra,* implicitly negative the Petitioner's contention.

If the District Courts of the United States in different States have such ancillary jurisdiction as to one another, the appointment of an Ancillary Receiver is a mere formality. It is only because the District Courts of the United States in different States, in so far as they exercise judicial power conferred by Article III of the Constitution, are independent foreign courts, one of the other, that it became necessary for this Court to announce the doctrine found in the cases of *Booth* v. *Clark, Hale* v. *Allinson* and the other authorities cited above.

This Court has always looked, not to the form, but to the substance of matters brought before it for adjudication. If, then, the United States District Courts had the power to appoint Ancillary Receivers upon the *ex parte* application of a mere foreign federal Receiver, this Court would not have announced nor reiterated the rule announced in *Booth* v. *Clark* as it has so frequently done. It would undoubtedly have held that the acceptance of jurisdiction by a district court of the United States, of a suit brought by a foreign federal Receiver, was tantamount to the appointment of such foreign Receiver as Ancillary Receiver by that court in that case.

WE INSIST THAT THE PROBLEM IS MUCH MORE SUBSTANTIAL THAN THAT. IT IS FUNDAMENTAL. IT INVOLVES THE VERY POWER OF THE COURT TO ACT, NOT THE FORM IN WHICH IT ACTS.

The decisions in these cases are based upon the recognition by this Court of the fact that the United States District Courts in different States have no such relation to one another as the Petitioner is here contending for; that they have no jurisdiction in civil cases, except to hear and determine suits brought in those courts in the manner prescribed by law; and that therefore an Ancillary Receiver cannot be appointed except in a pending suit.

For the foregoing reasons, we respectfully insist that the order of the United States District Court of the Southern District of New York purporting to appoint this Petitioner Ancillary Receiver was absolutely void, that under that order he acquired no rights or powers of any kind, and that therefore he has no right to maintain this suit.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed with costs.

New York, September 24, 1934.

Respectfully submitted,

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